



## H.R. 5104 – To extend the Protect America Act of 2007 for 30 days

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### FLOOR SITUATION

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H.R. 5104 is being considered on the House floor under suspension of the rules and will require a two-thirds majority vote for passage. This legislation was introduced by Representatives John Conyers (D-MI) and Silvestre Reyes (D-TX) on January 23, 2008. The bill was referred to the House Committee on the Judiciary and the House Committee on Intelligence, but was never considered.

H.R. 5104 is expected to be considered on the House floor on January 29, 2008.

*Note: Reps. Pete Hoekstra and Lamar Smith, Ranking Members on the Intelligence and Judiciary Committees, respectively, oppose a 30-day extension. The Administration has threatened to veto H.R. 5104.*

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### SUMMARY

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H.R. 5104 extends the Protect America Act of 2007 (P.L. 110-55) for an additional 30 days. It is currently set to expire on February 1, 2008. The Protect America Act passed the House on August 4, 2007, by a [vote of 227 to 183](#). It was signed into law by the President on August 5, 2007.

*Note: The House passed additional FISA legislation, H.R. 3773, on November 15, 2007, by a vote of 227-189. 184 Republicans voted against H.R. 3773 arguing that it fails to give the intelligence community the tools it needs to quickly respond to terrorist threats and inappropriately inserts the courts into the approval process for intelligence collection.*

### **Summary of the Protect America Act as passed by the House on August 4, 2007**

**Intelligence Gathering on Persons Outside of the United States:** The bill clarifies that surveillance directed at persons reasonably believed to be outside the United States is not electronic surveillance subject to the Foreign Intelligence Surveillance Act. S. 1927 authorizes the Director of National Intelligence (DNI) and the Attorney General (AG) to authorize and obtain third party assistance for the acquisition of foreign intelligence information on persons believed to be outside of the United States for up to one year, if the DNI and AG make *determinations* including 1) the acquisition is from or with the assistance of a second party and 2) that the procedures in place to determine that the acquisition is in fact of foreign intelligence information are reviewed by the Foreign Intelligence Surveillance Court.

**Certification of Determination that Intelligence Acquisition is Lawful:** The bill requires the DNI and the AG to certify in writing, under oath, and with supporting affidavits, that each acquisition of foreign intelligence information under this act is lawful. The certification is not required to identify the specific facilities, places, or property at which surveillance is to be directed.

**Expedited Certification Procedure for When Immediate Action is Required:** The bill authorizes the DNI and the AG when immediate government action is required, to certify the acquisition of foreign intelligence information within 72 hours of when a *determination* is made.

**Assistance from Communications Providers:** The bill requires communications providers to supply assistance in a manner that protects the secrecy of the information. The bill also authorizes compensation for a person who provides information, facilities, or assistance.



Failure to Comply: The bill establishes that the government may invoke the aid of the Foreign Intelligence Surveillance Court with respect to any failure to comply with a directive to provide assistance in acquiring intelligence information will result in a order from the Foreign Intelligence Surveillance Court and the person may be held in contempt of court for failure to comply with a court order.

Procedure Review by the Foreign Intelligence Surveillance Court: Within 120 days of enactment of this act, the Attorney General must submit to the FISA Court the procedures by which the government determines that intelligence information acquisitions under this act do not constitute electronic surveillance under the clarified definition. Within 180 days of enactment of this act the FISA Court shall assess the procedures and determine whether the Government's "determination is clearly erroneous."

*\*Note: If the FISA Court finds the Government's determination to be "clearly erroneous," then it shall issue an order requiring the Government to submit new procedures within 30 days or to cease any intelligence information acquisitions under this act.*

Sunset: This bill is only effective for 180 days after the date of enactment.

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## BACKGROUND

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The Foreign Intelligence Surveillance Act (FISA) of 1978 created the framework for foreign intelligence gathering using electronic surveillance. The FISA law established two courts, the U.S. Foreign Intelligence Surveillance Court (FISC), and the U.S. Foreign Intelligence Surveillance Court of Review, to authorize these foreign intelligence gathering activities.

In 1978, almost all international calls, or long-haul communications, were made over the air and bounced off satellites wirelessly. Those communications did not require an order under the FISA statute.

To protect the civil liberties of Americans, FISA required court orders for any signals that went through a wire, which is how most short-haul communications were conducted at the time the law was enacted.

Technology, however, has progressed by leaps and bounds in the six years since the Sept. 11 attacks, let alone in the three decades since the FISA laws were crafted. The outdated FISA laws restricted our intelligence community from utilizing a key tool in fighting the war on terror and protecting our national security.

Prior to enactment of the Protect America Act of 2007 (P.L. 110-55) in August 2007, wholly international communications transmitted over a wire required a FISA order. This requirement hindered our intelligence community's ability to collect vital intelligence from terrorists communicating with other foreign intelligence targets located in a foreign country.

It is difficult to compile enough information in a short period of time on a foreign person of interest to satisfy the FISA statute, and this is where the terrorist loophole arises.

According to the Director of National Intelligence, Michael McConnell, "We are significantly burdened in capturing overseas communications of foreign terrorists planning to conduct attacks inside the United States. We must make the requested changes to protect our citizens and the nation. In today's threat environment, the FISA legislation is not agile enough to handle the community's and the country's intelligence needs." ([Testimony to Senate Intelligence Committee, 5/1/07](#))

On August 4, 2007, the House passed the Protect America Act, a bipartisan act that closed the terrorist loophole. The law allowed our intelligence community to more effectively collect foreign intelligence in



# LEGISLATIVE DIGEST

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foreign lands, enabling them to obtain critical information at the critical time. President Bush signed this short-term fix into law on August 5, 2007. It expires in February 2008.

The House passed additional FISA legislation, H.R. 3773, on November 15, 2007, by a vote of 227-189. 184 Republicans voted against H.R. 3773 arguing that it fails to give the intelligence community the tools it needs to quickly respond to terrorist threats and inappropriately inserts the courts into the approval process for intelligence collection. The Administration threatened to veto H.R. 3773 citing similar concerns. During committee consideration of H.R. 3773, Republicans in both the Judiciary Committee and the Intelligence Committee offered a substitute amendment that would have extended the Protect America Act permanently and would have provided retroactive liability protection to companies alleged to have assisted the Government in the aftermath of the 9/11 attacks.

Rep. Heather Wilson (R-NM) has also proposed narrowly-tailored legislation to close this loophole by allowing surveillance targeting foreign communications without a warrant.

During the 109<sup>th</sup> Congress, the House passed H.R. 5825, The Electronic Surveillance Modernization Act, which fundamentally modernized and enhanced FISA. The bill, however, never passed the Senate.

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## ADDITIONAL VIEWS

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*The Administration has threatened to veto H.R. 5104, arguing that a permanent fix is needed immediately and that Congress does not need an additional 30 days to pass a bill that it has had almost 6 months to renew. ([Statement of Administration Policy, 1/28/08](#))*

*Reps. Pete Hoekstra and Lamar Smith, Ranking Members on the Intelligence and Judiciary Committees, respectively, oppose a 30-day extension of the Protect America Act, arguing that "the intelligence community needs a permanent fix to gaps in our intelligence laws – not a 30 day delay." ([Dear Colleague, 1/29/08](#))*

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## COST

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There was no Congressional Budget Office cost estimate available at the time of this publication.

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## STAFF CONTACT

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